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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN MATTHEWS, Defendant and Appellant.	B173853 (Los Angeles County Super. Ct. No. BA 248070)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Reversed in part, modified in part with directions and affirmed.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial during which he represented himself, defendant Steven Matthews was convicted of two counts of possessing a dirk or dagger (Pen. Code, § 12020, subd. (a)(4), counts one and two)[1] and one count of resisting, obstructing or delaying a peace officer (§ 148, subd. (a), count three). Following a bench trial, the court found defendant had suffered nine prior serious felony convictions or juvenile adjudications (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and had served two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to two concurrent 25-to-life terms on counts one and two and a concurrent one-year term for count three. The sentences for the prior prison terms were stricken.

Defendant appeals from the judgment. His primary argument is that one of the possession counts must be reversed, as the weapon in question does not fall within the statutory definition of a dirk or dagger.[2] He also asserts there was insufficient evidence to support the trial court's finding he had suffered certain prior convictions.

We agree with defendant's contention concerning the weapon, and determine there was insufficient evidence to support the court's finding as to one of the prior allegations. The conviction for count two and the true finding as to one of defendant's juvenile priors must be reversed. However, for the reasons set forth below, the matter need not be remanded for resentencing.

FACTS

On May 23, 2003, Los Angeles Police Department officers encountered defendant and a woman walking on the street. Defendant was arguing with the woman and was drinking from a beer bottle. The officers stopped to investigate. After a period of time, during which defendant refused to comply with the officers' orders, he ultimately heeded

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1 All further undesignated statutory references are to the Penal Code.

2 Neither the information nor the parties makes clear which weapon corresponded to which count. As it makes no difference, we will arbitrarily deem the hammer to be the weapon alleged to have been possessed in count two.

their request to put his hands behind his head. Just prior to doing so, defendant untied a Pendleton shirt he was wearing around his waist and a machete fell out and hit the ground. One of the officers removed the hammer, which is the subject of this appeal, from defendant's right front pants pocket.

The hammer had a 12-inch handle and a "large metal head." On both sides of the head there were the words "fag finder reminder." One of the officers described it as a "geologist hammer" used for "[b]reaking out smaller rocks from larger rocks."[3] Upon examination, the wooden handle is approximately ten and one-half inches long. The head of the hammer is roughly four and one-quarter inches in length. One end of the head is one inch square, while the other end tapers to a blunt point. The point is not sharpened. The hammer head does not appear to have been altered in any way.

DISCUSSION

Sufficiency of the Evidence

Defendant argues the hammer cannot be found to be a dirk or dagger, as a matter of law. His contention has merit. A dirk or dagger is defined as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." (§ 12020, subd. (c)(24).) Neither side was able to cite authority on point. In this case, the old adage, "a picture is worth a thousand words," is most appropriate. One who saw the hammer would have to use the most tortured definition of "stabbing weapon" to conclude it fit the definition. We determine, as a matter of law, the hammer possessed by defendant is not a dirk or dagger within the meaning of section 12020, subdivision (c)(24).

As we agree count two must be reversed, we need not address defendant's other contentions relating to that conviction.

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[3] The hammer was received from the trial court. A photograph is attached as an appendix to this opinion.

Proof of the Prior Convictions

Defendant contends there was insufficient evidence to prove his prior conviction in Case No. 4823 (Yolo conviction) and his prior juvenile adjudications in Case No. J44980 (adjudications). In addition, he argues the only evidence to support the Yolo conviction was an "Arrest Disposition Report." This report, he claims, was not authenticated and constituted inadmissible hearsay.

All of the evidence presented during the court trial was received without objection. To the extent defendant now asserts certain evidence lacked foundation or was inadmissible hearsay, he has waived those claims. (*People v. Williams* (1997) 16 Cal.4th 153, 208-209; *People v. Poggi* (1988) 45 Cal.3d 306, 331.)

As to the adjudications, defendant argues no juvenile prior may be used as a strike unless there is evidence "[t]he juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code . . . ." (§ 667, subd. (d)(3)(D).) Defendant does not dispute he was adjudged a ward of the court. However, he asserts the records, at best, show he committed the crimes of kidnapping, as defined by section 209, and robbery. He argues section 209 also includes the crime of kidnapping for the purpose of committing a rape, a crime not listed in the aforementioned section of the Welfare and Institutions Code.

The prosecution submitted defendant's criminal history from the Department of Justice which established he was placed in the California Youth Authority for robbery and kidnapping. In addition, records from the California Youth Authority showed defendant was received by it for the offenses of "602 W&I Robbery; Kidnapping." The evidence presented was sufficient to establish the prior adjudication for robbery, but not the kidnapping. The proof at trial merely showed he had been convicted of "kidnapping." That crime is not in the laundry list set forth in Welfare and Institutions Code section 707, subdivision (b). Therefore as to the kidnapping, the prosecution did not establish defendant was adjudged a ward of the court for committing an enumerated crime. The true finding as to that prior adjudication must be set aside.

As to the Yolo conviction, he claims it was proven "solely by the use of a form entitled 'Disposition of Arrest and Court Action'" This form, he argues, is inadmissible hearsay. As noted above, he has waived that objection. In any event, defendant offers no authority for his assertion the form is inadmissible. The report was part of the records from the Department of Justice. The records are no different than those accepted under Evidence Code section 1280 in the case of *People v. Martinez* (2000) 22 Cal.4th 106, 134. In addition, defendant's criminal history, again an official record according to *Martinez*, established he was convicted, by plea, of robbery on the date alleged in the information. The prior conviction was proven by competent evidence.

Defendant contends the use of records to prove prior convictions is prohibited by *Crawford v. Washington* (2004) 541 U.S. 36. Not so. *Crawford* restricted the use of hearsay statements by witnesses who were not available for cross-examination. Nothing in the opinion purports to address the use of documentary evidence in the form of official records admissible pursuant to Evidence Code section 1280.

Finally, defendant claims the juvenile robbery adjudication may not be used to enhance his sentence because juveniles do not have a right to a jury trial. Two appellate decisions examined the same federal authority cited here (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187) and determined it was not unconstitutional to use a juvenile adjudication to enhance a sentence. (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1075; *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394.) We see no reason to part company. Defendant argues *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403], should alter the outcome. This assertion is unavailing. In the context of enhancing sentences with juvenile adjudications, *Blakely* does nothing to change the holding of *Apprendi.*

Given our conclusion defendant's prior kidnapping adjudication must be reversed, the issue of remand for the purpose of resentencing must be examined. Eliminating the prior kidnapping adjudication leaves defendant with eight prior convictions or adjudications. Given the nature of the offenses (one murder, one assault with intent to commit murder, two attempted murders, one rape, one forcible oral copulation, and two

robberies), any sentence other than the 25-to-life sentence which has already been imposed would be an abuse of discretion. (See *People v. Williams* (1998) 17 Cal.4th 148.) Therefore, there is no reason to remand this matter for resentencing.

DISPOSITION

The conviction for count two and the true finding on the juvenile kidnapping adjudication are reversed. The matter is remanded to the trial court for the purpose of correcting the abstract of judgment and forwarding a corrected copy to the Department of Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

SPENCER, P. J.

VOGEL, J.

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

APPENDIX


ADMITTED IN EVIDENCE